(3)

No. 99-1984

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1999

DIANE SANK,

Petitioner,

v.

NEW JERSEY, ET AL,

Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of the State of New Jersey

REPLY BRIEF FOR PETITIONER

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19pp

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ADDENDUM OF STATEMENT OF CASE

As of this date, no Respondent in this matter has filed a formal brief in opposition to this petition that conforms to the rules promulgated by this Court. The time for such responses has run. The New Jersey Office of the Attorney General, has however, filed a letter brief which is permitted by the *New Jersey Rules of Court*. (See Letter Brief in Appendix A at 1a).

The letter brief advances arguments why this Court should not grant certiorari and cites to the New Jersey appellate decision which joined the 1997 and 1998 cases into this single matter which is the subject matter of this petition.

Inasmuch as the letter brief advances legal arguments and cites an authority for reasons not to grant the Petitioner a Writ, Petitioner therefore submits this reply brief.

REASONS FOR GRANTING THIS PETITION

POINT I THE ATTORNEY GENERAL'S LETTER BRIEF DOES NOT CONFORM TO THE RULES OF THIS COURT AND SHOULD BE STRICKEN FROM THE RECORD.

Rule 15 of *the Rules of the Supreme Court of the United State* govern the submission, content, and format of briefs in opposition. This rule was not followed by the Attorney General. As a result of his non-conforming letter brief, Petitioner was placed in a dilemma. She could either ignore the existence of the letter brief and pray that this Court would ignore the document and its arguments -- or she could reply, rebutting the Attorney General's arguments against granting a Writ.

The Petitioner comes before this Court *pro se*. She is wary of the reasons the Attorney General chose to waive his right to file a formal brief in this matter and at the same time,

file a letter brief. The Attorney General has a virtual army of attorneys at his command who could file a conforming brief and are members of the Supreme Court Bar. Given the weight of his office, is this a strategic ploy whereby the Attorney General seeks to advance arguments by letter that could influence this Court yet unwittingly go unchallenged by a *pro se* Petitioner? There is no question that the letter was intended as a letter brief, to wit: this Court received a second letter from the attorney representing another Respondent in this matter wherein counsel expressly concurred with the "reasons" given by the Attorney General for denying the Petitioner a Writ. (Appendix B at 3a).

The Petitioner files this reply brief as a logical, common-sense response to the Attorney General's letter brief. She chooses not to risk that this Court would accept the Attorney General's arguments as depositive and unchallenged.

The Petitioner respectfully asks this Court to strike the letter brief with prejudice for non-conformity with the rules of Court and refuse any other briefs from the Attorney General that might be submitted in an untimely manner.

POINT II THE APPELLATE COURTS FAILED TO RENDER A DECISION ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The facts giving rise to this petition are clear. Twice the Petitioner failed to win primary elections because of constitutionally unfair, primary election laws. To prevent inevitable injury in 1997, before the general election occurred -- and in time to have a special election -- Petitioner sought a Temporary Restraining Order and was denied. The subsequent 1997 trial and appeal then proceeded at a snail's pace and languished in the appellate court until that court could join the 1998 case in which the Petitioner had attempted

accelerated and emergent relief at every step in the judicial process -- only to be denied at each step.

Finally, on October 6, 1999, the Appellate Division issued an opinion which joined the 1997 and 1998 cases, coming to the same conclusion as to both of the Petitioner's appeals. In short, the court dismissed *both* appeals as moot, chiding the Petitioner's failure to seek accelerated process in the 1997 case and ignoring the fact that she did seek accelerated process in 1998.

The appellate decision is analogous to a tired but often true cliché -- "damned if you do and damned if you don't." The egregious irony of the decision is that the appellate court issued their denial on the grounds of mootness which they themselves created artificially!

Furthermore it is postulated by Petitioner, that the issues presented herein will forever evade review by the state courts because of the underlying political considerations of evaluating the various onerous state statutes.

Petitioner argues that the lower courts' grounds for denying relief were neither adequate and independent. Neither New Jersey's election laws nor rules of court mandate that an election suit be brought before an election. The rule of the case cited by the appellate court was taken out of context and paraphrased and when it is read in its entirety, endorses the Petitioner's position. For example, in its entirety, *In the Matter of the Alleged Error in the Preparation of the Ballot for the Recall Election in the City of Hackensack*, 31 *N.J.* 592, 598 (1960), the court stated

> The time to protest is before the election, and not, as here, after the event. Elections are solemn events of tremendous public significance. We recently reiterated that in the absence of malconduct or fraud a concluded election will not be voided for an irregularity in the ballot unless it can be said that in

> all human likelihood it interfered with the full and free expression of the popular will and thus influenced the result.

Petitioner submits that her case in a perfect example of election practices which interfered with the free expression of voters and influenced election results. Furthermore, this Court has ruled in the past that although it would not normally consider the correctness of the non-federal ground, it would do so if the ground was "an obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc. et al*, 326, 332 *U.S.* 120 (1945).

POINT III THE ISSUES RAISED HEREIN PRESENT POLITICAL QUESTIONS OF GREAT PUBLIC IMPORTANCE THAT ARE EGREGIOUSLY REPETITIOUS AND THE LOWER COURTS CONTINUE TO EVADE REVIEW ON THEIR MERITS AND PROACTIVELY MOOT THE ISSUES FOR SUBSEQUENT COURTS.

The Attorney General would have this Court deny Petitioner certiorari inasmuch as the New Jersey appellate court declared the two cases in this matter as "moot." The appellate court stated that "[a]lthough this court may decide moot controversies where issues of great importance are presented . . . we see no reason to invoke this power in the present case." (See Petitioner's brief, Appendix B at 8a). What the Attorney General in his letter brief and the appellate court failed to acknowledge, was the fact that the appellate court by its own proactive inaction, created the mootness issue now before this Court. Furthermore the court chose to ignore the Constitutional issues, which by their very nature, can be raised at any time. By denying certification, the New Jersey Supreme Court effectively endorsed the appellate decision.

In reply, the Petitioner relies upon and submits to this Court that the rationale of *Morse et al. v. Republican Party of Virginia*, 517 *U.S.* 186 (1996), should be controlling for the issues before this Court. In *Morse* the appellees argued that the issue before the court was moot because the party convention had already been held. The Morse Court expressly stated, "Like other cases challenging electoral practices. *** this controversy is not moot because it is "capable of repetition, yet evading review," citing *Anderson v. Celebrezze*, 460 *U.S.* 780, 784, n. 3 (1983); *Storer v. Brown*, 415 *U.S.* 724, 737, n. 8 (1974); *Moore v. Ogilvie*, 394 *U.S.* 814, 816 (1969).

It should also be noted that from 1969 until September 1996, the *New Jersey Court Rules*, specifically *R.* 1:2-5, directed trial and appellate courts to accord certain cases accelerated calendar preferencing, including election actions, actions to which the State was a party; and actions in lieu of prerogative writs. The Petitioner's 1998 case fell into all three of these categories. It is an election action, an action in lieu of prerogative writ, and most important, the State of New Jersey was a party-defendant. The Official Comment to the 1996 deletion of the rule made it clear that the deletion of the rule was not intended to reflect an altered administrative perception of the necessity for appropriate trial preferences. Pressler, *Current N.J. Court Rules*, Comment R. 1:2-5. (Gann).

In past instances the New Jersey Appellate Court and the New Jersey Supreme Court recognized and acknowledged election cases, including primaries, as a class, as matters involving issues of urgent and great public importance, to receive emergent status and/or accelerated hearings and decisions. *Farrington v. Falcey*, 96 *N.J. Super.* 409, 412 (App. Div. 1967); *Bado v. Gilfert*, 13 *N.J. Super.* 363 (App. Div. 1951) and *Moskowitz v. Grogan*, 101 *N.J. Super.* 111

(App. Div. 1968); *Catania v. Haberie*, 123 *N.J.* 438 (1991); *Stevenson v. Gilfert*, 13 *N.J.* 496, 498 (1953) and *Fields v. Hoffman*, 105 *N.J.* 262 (1987). This is but a sampling of the cases.

Petitioner submits that this United State Supreme Court is the Petitioner's "court of last resort" inasmuch as this petition raises political issues which the political parties would like to go away. It is the Petitioner's common sense conviction that the issues raised herein will never be heard on the merits by the existing New Jersey Supreme Court for the following reasons: six of the seven now sitting justices, including the chief justice, lack tenure and must be reconfirmed by the Senate seven years after their elevation to the high court. Their tenure rests on the good will of the men who wrote and enacted *N.J.S.A.* 19:49-2 and *N.J.S.A.* 19:13-20.

Furthermore, three of the justices are former Attorney Generals who were also charged with executing the election laws that are the raison d'être of this matter. Justice Veniero was the Attorney General when both of the cases joined in this matter were brought to trial. He defended Respondent County Clerk in both the 1997 and 1998 cases and then sat on the New Jersey Supreme Court panel which denied the Petitioner certification. Justice Long denied the motion for emergent relief at the appellate level and upon elevation to Supreme Court, sat on the panel which denied this matter certification. Chief Justice Poritz is also a former Attorney General and she issued the decision denying certification.

Although the granting of accelerated process and emergent relief is discretionary with the New Jersey courts, in 1998 Petitioner sought both at all times, at each judicial level. It was granted at the trial level but expressly denied at the appellate level and by the New Jersey Supreme Court. In

effect by denying emergent relief, the courts forced Petitioner to follow the slow route to this Court. By denying accelerated process, the New Jersey courts dealt the Petitioner two devastating blows: 1) Petitioner's claims could not heard on their merits before the General Election, and 2) Petitioner's claims were forced into a technically "moot" characterization.

The following timeline demonstrates the *pro se* Petitioner's good faith attempt to obtain relief prior to the General Election:

- In her *first case*, on August 18, 1997, more than two months before the general election, Petitioner filed her appeal.
- In her *second case*, the 1998 Primary Election was held June 2.
- Petitioner filed a verified pro se complaint on June 8, 1998, six days after losing the primary election.
- Trial Court issued final order dismissing the case on July 30, 1998.
- Petitioner filed an application and brief for acceleration and emergent relief on August 12.
- New Jersey Supreme Court denied the "motion to accelerate and further relief" on August 19.
- On August 24, Petitioner filed a Motion for Leave to Appeal Appellate Division Denial of Request for Emergent Relief which raised *inter alia*, the following two issues:

POINT I WITHOUT THE EMERGENT ACTION OF THIS COURT AND THE RELIEF REQUESTED IN HER MOTION, THE MOVANT WILL BE UNABLE TO MEET THE TIME DEADLINES NECESSARY TO RUN IN THE GENERAL ELECTION AND SIMILARLY SITUATED CANDIDATES WILL CONTINUE TO BE INJURED, NOW AND IN THE FUTURE.

POINT V *N.J.S.A.* 19:49-2 IS UNCONSTITUTIONAL AS WRITTEN AND APPLIED AND THE STATE FAILED TO DEMONSTRATE A COMPELLING STATE INTEREST TO UPHOLD ITS CONSTITUTIONAL VALIDITY. (See Brief Lodged as A, Supporting Request for Emergent Relief before N.J. Supreme Court).

The Supreme Court refused to grant emergent relief by order dated September 2, 1998, forcing the Petitioner to file a regular appeal, utilizing the normal, slow appellate process which was finally heard and a decision rendered by the appellate court on October 6, 1999. *It should be noted well that all this time, the 1997 election case languished before the appellate court which waited to join the 1998 case into a single matter that is now before this Court.* The New Jersey Supreme Court denied certification on March 7, 2000, giving rise to this Petition.

Petitioner argues to this Court that the courts below are using mootness as an excuse for their failure to reach the Constitutional merits of issues presented by these two joined cases and that they should not be allowed to escape the scrutiny of this Court by opining a mootness that they themselves created! To deny this Petition would be to deny fundamental fairness. Petitioner submits to this Court that the courts below used artifice so that they do not have to decide politically unsavory issues -- issues that carry with them the potential to injure the jurists that decide them, and by deciding them, subject them to public and political scrutiny.

POINT IV ELECTION LAWS WHICH DESTROY THE INTEGRITY OF THE ELECTORAL PROCESS, DISENFRANCHISE VOTERS, AND WEAKEN POLITICAL PARTIES ARE OF SUCH IMPORTANCE THAT THIS COURT SHOULD GRANT PETITIONER'S WRIT.

N.J.S.A. 19:13-20 disenfranchises voters. In the case of a tie vote in a municipal primary election, this statute mandates that a few members of a municipal political party decide who will represent the party in the general election. It does not provide for due process or a forum wherein the candidates can plead their candidacy before the committee. In 1997, Petitioner and her opponent for a council seat each received 150 votes. The tie was broken in a closed meeting attended by her opponent who was a member of the committee. The Petitioner was not notified of the meeting or invited to attend. Her opponent was elected winner of the Primary Election by his fellow committee members.

It is submitted that this statute is unconstitutional on its face inasmuch as it deprives registered voters the opportunity to elect who they wish to represent the party in the General Election. (See Point II of Petition, p. 14). It is a perfect example of a statute that promotes voter apathy. Indeed why should a voter cast a vote if his vote can be so cavalierly discarded?

N.J.S.A. 19:49-2 was designed to give the political party hierarchies the power to control who will be party candidates in primary elections -- and thus on the party's ticket in the General Election. In certain New Jersey counties where one political party dominates, winning the party's nomination in the primary guarantees a candidate will win the General Election.

N.J.S.A. 19:49-2 is discriminatory. It gives one individual in each county, i.e., the county campaign manager, uninhibited power. The campaign manager is appointed by candidates running for county office. He is not elected by registered party voters. Once appointed the campaign manager (who is invariably the County Party Chairman), has the power to grant or withhold the party slogan and the party preferred

column position on the ballot -- which in effect acts as a party endorsement and promulgates the discriminatory practice of creating second class party candidates. These second class candidates are powerless to appeal their classification since they are not provided a hearing or forum. In application, this statute operates as the political party's tool of exclusion rather than association.

Petitioner submits that this statute denies equal protection, procedural due process, right to associate, and deprives candidates of valuable property. (See Point III of Petition, p. 17).

In conclusion, the Petitioner submits that *N.J.S.A.* 19:49-2 and *N.J.S.A.* 19:13-20 pervert the very essence of the Federal Constitution. They should be stuck down by this Court inasmuch as they allow the government that was created "by people and for the people" to evolve into one that is controlled *by the party hierarchy for the party hierarchy.*

CONCLUSION

For all of the aforementioned reasons, the Petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

DIANE SANK, *Pro Se* Date: September 10, 2000

APPENDICES

APPENDIX A

State of New Jersey
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June 21, 2000

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
U.S. Supreme Court Building
1 First Street N.E.
Washington D.C. 20543

Re: Diane Sank v. State of New Jersey et al.
Docket No. 99-1984

Dear Mr. Suter:

The State of New Jersey waives its right to file a brief on behalf of the Bergen County Superintendent of Elections and the Bergen County Board of Elections in opposition to the petition for a writ of certiorari in the above entitled matter. However, if the Court requests that a brief be filed, the Attorney General will file a brief.

The within appeal is from the dismissal of petitioner's complaint challenging the nomination of other persons as the Republican candidates for Councilperson in Englewood Cliffs, New Jersey in 1997 and 1998 primaries. The Appellate Division of New Jersey dismissed the matter as moot in that the general election had been held and the successful candidates sworn in advance of the appeal being perfected and heard (Appendix B to Petition for a Writ of Certiorari); thereafter, the New Jersey Supreme Court denied certification (Appendix A to Petition for a Writ of Certiorari). In affirming the dismissal of the matter, the Appellate Division stated that "[a]lthough this court may decide

[p.2]

moot controversies where issues of great importance are presented...we see no reason to invoke this power in the present case." (Appendix B at 8a).

Respectfully submitted

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY

By : /Andrea M. Silkowitz/

Andrea M. Silkowitz
Assistant Attorney General

cc: Diane Sank, pro se
John Carbone, Esq.
Stephen P. Sinisi, Esq.

APPENDIX B

SINISI & SPROVIERO
COUNSELLORS AT LAW

STEPHEN P. SINSI
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RALPH W. SOUKIS
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MEMBER N.J. BAR

June 29, 2000

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
U.S. Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

Re: Diane Sank v. State of New Jersey
Docket No. 99-1984

Dear Mr. Suter:

Please be advised that the undersigned represents Henry Shotmeyer, individually and in his capacity as Chairman of the Bergen County Republican Organization, in the above-entitled matter.

On our client's behalf, we acknowledge receipt of a copy of correspondence dated June 21, 2000, submitted to the Court from Andrea M. Silkowitz, Assistant Attorney General of the State of New Jersey, representing the Bergen County Superintendent of Elections and the Board of Elections, respectively.

For substantially the reasons expressed in Ms. Silkowitz's correspondence, we agree with the position set forth therein and will file no brief unless requested by the Court.

I hereby certify that I am a member in good standing of the Bar of the Supreme Court of the United States, having been admitted October 2, 1978.

Respectfully submitted,

SINISI & SPROVIERO

By /Stephen P. Sinisi/
Stephen P. Sinisi

SPS:rk

cc: Diane Sank
Henry Shotmeyer
John M. Carbone, Esq.
Andrea M. Silkowitz, Esq., AAG